No. 11-1324

ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 30, 2013

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALI HAMZA AHMAD SULIMAN AL BAHLUL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Review from the United States Court of Military Commission Review

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BRIEF OF *AMICI CURIAE* FORMER GOVERNMENT OFFICIALS, FORMER MILITARY LAWYERS, AND SCHOLARS OF NATIONAL SECURITY LAW IN SUPPORT OF RESPONDENT

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GLOSSARY OF ABBREVIATIONS

ICTY	International Criminal Tribunal for the former Yugoslavia
JCE	Joint Criminal Enterprise
MCA	Military Commissions Act of 2006

INTERESTS OF THE AMICI CURIAE[2]

Amici curiae Former Government Officials, Military Lawyers and Scholars of National Security Law, who respectfully submit this brief in support of Respondent, have focused their practice, teaching, and scholarship on harmonizing security needs and procedural safeguards in national security law and the law of armed conflict. Based on that experience, *amici* submit a brief that provides a narrowly tailored basis for upholding the conviction below.

Several members of the group, including Geoffrey S. Corn, Chris Jenks, and Eric Talbot Jensen, have had long and distinguished careers as military lawyers, serving as prosecutors and defense counsel in proceedings under the Uniform Code of Military Justice and as senior advisors on compliance with international law. Most members of the group are now scholars and teachers of national security law

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[2] The parties have consented to filing of this brief. *Amici* have corresponded with the Washington Legal Foundation (WLF), which has also filed a notice of intent to file an *amicus curiae* brief in support of respondent, and certify pursuant to Circuit Rule 29(d) that a joint brief would be impracticable. In addition, pursuant to Fed. R. App. P. 29(c)(5), counsel for *amici* certify that they authored this brief and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of the brief.

and the law of armed conflict, between them writing scores of law review articles[3] and several books, including casebooks used to educate future lawyers who serve in the armed forces of the United States or otherwise practice in the national security field.[4] Members of the group have also served in the federal government, including positions in the State Department, the Federal Bureau of Investigation, and the Office of the Director of National Intelligence. The experience of *amici* has proven the value of the United States' adherence to international law.

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[3] *See, e.g.,* Geoffrey Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations*, 42 Israel L. Rev. 46, 66 (2009); Chris Jenks, *Notice Otherwise Given: Will in Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?*, 33 Fordham Int'l L.J. 57 (2009); Eric Talbot Jensen, *Cyber Warfare and Precautions Against the Effects of Attacks*, 88 Tex. L. Rev. 1533 (2010); Michael A. Newton, *Exceptional Engagement: Protocol I and a World United Against Terrorism*, 45 Tex. Int'l L.J. 323 (2009).

[4] For casebooks, *see* Geoffrey S. Corn, Victor M. Hansen, Richard Jackson, M. Christopher Jenks, Eric Talbot Jensen & James A. Schoettler, Jr., *The Law of Armed Conflict: An Operational Approach* (2012); Stephen Dycus, Arthur C. Berney, William C. Banks & Peter Raven-Hansen, *National Security Law* (5th ed. 2011); Stephen Dycus, William C. Banks & Peter Raven-Hansen, *Counterterrorism Law* (2d ed. 2012). For other books, *see* William C. Banks & Peter Raven-Hansen, *National Security Law and the Power of the Purse* (1994); Jimmy Gurule & Geoffrey S. Corn, *Principles of Counter-Terrorism Law* (2011); Victor M. Hansen & Lawrence Friedman, *The Case for Congress: Separation of Powers and the War on Terror* (2009); Geoffrey S. Corn, Victor M. Hansen, Dick Jackson, Eric Talbot Jensen, Michael W. Lewis & James A. Schoettler, Jr., *The War on Terror and the Laws of War: A Military Perspective* (2009)

The group's collective experience teaches that compliance with international law often requires careful tailoring of United States legal measures, including the Military Commissions Act of 2006 (MCA). *Amici* believe that narrowly tailored charges of conspiracy as a mode of liability and material support brought under the MCA are analogous to charges of Joint Criminal Enterprise (JCE) and aiding and abetting a war crime, which are recognized under international law. Thus the defendant's conviction did not violate the Ex Post Facto Clause or exceed Congress's authority under the Define and Punish Clause. In the instant case, this narrowly crafted approach provides an alternative to the parties' arguments.

SUMMARY OF ARGUMENT

The defendant's acknowledgment of his "simple…indirect role" in the September 11 plot, Petitioner's Appendix (Pet. App.) 208, proved his participation in a Joint Criminal Enterprise (JCE), an offense regularly tried in transnational tribunals. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 196 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999). Under international law, an individual is guilty of participation in a JCE if he intentionally aids a common plan that results in a completed war crime. *Id.* Participation encompasses serving as a "cog in the wheel of events leading up to the result

which in fact occurred." *Id.*, ¶ 199 (quoting from World War II-era precedent). While the defendant was charged with conspiracy, not JCE, international tribunals have recognized that conspiracy as a mode of liability for a *completed* war crime precisely tracks the elements of JCE. *See Prosecutor v. Brdanin*, Case No. IT-99-36-A, Appeals Chamber Judgment, ¶¶ 404, 410 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007).

The members of the commission specifically found that the defendant had committed overt acts corresponding to a role in the 9/11 plot, including his administration of Mohammed Atta's and Ziad al Jarrah's *bayat* or loyalty oath to Osama bin Laden. Pet. App. 132. The *bayat* to Atta, the 9/11 plot's ringleader in the United States, and al Jarrah, the pilot on Flight 93, set the 9/11 machinery in motion. The *bayat* bound Atta and al Jarrah to "obey [bin Laden] at all times," Transcript (Tr.) 509, and "die for the sake of Jihad… against the American[s] and the Jews." *Id.* at 510. Moreover, the defendant groomed Atta and al Jarrah for a mission of particular "sensitivity," living with them to "keep them on task." *Id.* at 555-56. Al Bahlul embraced his role with the intention of aiding in the targeting of civilians – indeed, he asserted that Americans were not civilians because they supported the policies of the United States government. Pet. App. 184. Because JCE was an established offense in transnational tribunals at the time of the

defendant's acts, his conviction did not violate the Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3, or exceed Congress's authority under the Define and Punish Clause. U.S. Const. art. I, § 8, cl. 10.

Although the initial conspiracy charge against the defendant and an instruction regarding the charge each contained an error, these errors were harmless. The charge sheet contained an error, since it failed to allege a completed war crime. International law generally does not recognize inchoate conspiracy as an offense. *See* Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 Chi. J. Int'l L. 693, 702 (2011) (noting that today's transnational tribunals recognize the inchoate offense of conspiracy only in context of genocide). However, the list of overt acts in the charging documents, including administration of the *bayat* to Atta and al Jarrah, provided the defendant with adequate notice that he was being charged in connection with his role in the September 11 attacks. Pet. App. 132. Because the defendant had adequate notice that the charges against him incorporated conspiracy as a mode of liability for a completed war crime, any variance between the charge and the proof was harmless error. *See United States v. Ratliff-White*, 493 F.3d 812 (7th Cir. 2007). A related error in the instructions was similarly harmless, in light of the commission members' specific findings and evidence in the record. See *Neder v. United States*, 527 U.S. 1 (1999).

ARGUMENT

I. CONSPIRACY AS A MODE OF LIABILITY FOR A COMPLETED WAR CRIME IS RECOGNIZED BY INTERNATIONAL LAW AND SUPPORTED BY THE RECORD AND FINDINGS IN THE INSTANT CASE

Conspiracy as a *mode of liability* for a *completed* war crime has a long pedigree in customary law, international agreements, and the jurisprudence of transnational tribunals, dating from Nuremberg to the present. *See Prosecutor v. Brdanin*, Case No. IT-99-36-A, Appeals Chamber Judgment, ¶¶ 393-404 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007) (discussing Nuremberg conspiracy cases brought under Control Council Law No. 10); *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, Appeals Chamber, ¶ 24 (Int'l Crim. Trib. for Rwanda Oct. 22, 2004) (same). In contrast, international law does *not* recognize conspiracy as an *inchoate* offense involving mere agreement. *Hamdan v. Rumsfeld*, 548 U.S. 557, 598-612 (2006) (*Hamdan I*) (plurality opinion). Because of its pedigree, conspiracy as a mode of liability is "firmly established" as an offense under international law. *Hamdan v.*

United States, 696 F.3d 1238, 1250 (D.C. Cir. 2012) (*Hamdan II*). That clear pedigree supports the jurisdiction of military commissions. *Id.* at 1249-51.[5]

According to the ICTY, conspiracy as a mode of liability precisely tracks the elements of JCE: intentional participation in a common plan that gives rise to a completed war crime. *See Brdanin Appeals Judgment*, ¶¶ 404, 410; Ohlin, *Joint Intentions to Commit International Crimes*, 11 Chi. J. Int'l L. at 696-706 (discussing relationship between JCE and conspiracy as mode of liability). JCE liability is quite broad. In *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), the ICTY read the statute to require that a defendant "voluntarily participate in *one aspect* of the common design" to kill civilians. *Id.*, ¶ 196 (emphasis added). Culpable participation in a JCE includes acts of a defendant who intentionally serves as a "cog in the wheel of events leading up to the result which in fact occurred." *Id.*, ¶ 199 (quoting from World War II-era precedent). The cases also do not require that a defendant have specific advance knowledge of a particular crime. *See Brdanin Appeals Judgment*, ¶ 418 (noting that JCE liability does not

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[5] Congress may receive greater deference when it prospectively establishes military commission jurisdiction. *See Hamdan II*, 696 F.3d at 1246 n. 6 (Kavanaugh, J., concurring).

require, beyond a finding of a common purpose, "an additional… agreement to commit… [a] *particular* crime between the accused and the principal perpetrator of a crime") (emphasis added).

In the instant case, the defendant al Bahlul's contributions to the September 11 plot parallel the ICTY's definition of JCE. Al Bahlul's acknowledgment that he had played a "simple… indirect role" in the September 11 attacks, Pet. App. 208, showed that he "voluntarily participate[d] in one aspect of the common design" to kill civilians. *Tadic Appeals Judgment*, ¶ 196. Al Bahlul assisted in this common plan by grooming Atta and al-Jarrah for Al Qaeda's lethal handiwork.

This grooming process started with the *bayat* that the defendant administered to Atta and al Jarrah. As an FBI agent testified at defendant's trial, the *bayat* administered to Atta and al Jarrah was not an empty ritual. Rather, it was a means for impelling the oath-taker to action. As the agent testified, the *bayat* was an "oath that you… join in this war together for better or for worse, in secret or… overtly… you obey at all times regardless if you like the order or if you don't. And you're willing to die for the sake of Jihad." Tr. 509. The oath taken by the defendant and then given by him to Atta and al Jarrah specifically mentioned the "Jihad of Usama bin Laden against the American[s] and the Jews." *Id.* at 510.

The *bayat* was only the tip of the iceberg of the defendant's relationship with Atta and al Jarrah. As the defendant told the FBI, the two key 9/11 figures roomed with the defendant in bin Laden's compound. *Id.* at 555. According to the FBI agent who testified based on his interviews with Al Qaeda figures and knowledge of Al Qaeda tradecraft, this placement of Atta and al Jarrah with the defendant was not fortuitous. The agent explained that it was "normal for people who have a task, who have a mission, to be isolated, not to be put in a guesthouse or in a training camp. They will be taken aside because of the sensitivity of the mission." *Id.* As the agent observed, "people who stayed with suicide attackers have a motivational role to keep them focused, to keep them on task…" *Id.* at 555-56. In short, the agent concluded, al Bahlul was not merely sharing quarters with Atta and al Jarrah; rather, he was "coordinating their stay" to optimize their utility for the organization. *Id.* at 555.

The lethal consequences of this participation were not lost on the defendant – in fact, they were precisely the point. As he told the FBI without hesitation, killing United States civilians, including women and children, was perfectly appropriate. *Id.* at 502-03. The defendant's rationale was straightforward: "[It]t is legitimate," he told the FBI, "to kill all Americans because they pay taxes" that support the government. Pet. App. 184. Moreover, once captured, al Bahlul was

eager to inform the FBI that his willing facilitation had borne fruit. He touted his role in Al Qaeda's propaganda exploitation of the September 11 tragedy, boasting that at bin Laden's request he had prepared an analysis of the attacks' economic consequences for the United States. *Id.* at 194. Defendants' specific involvement with the preparation and aftermath of the September 11 attacks distinguish his case from that of Salim Hamdan, whose acts were largely limited to generic activities such as driving bin Laden to "various planning meetings." *Hamdan II*, 696 F.3d at 1242. The facts in defendant's case satisfy the elements of JCE – willing participation in a common plan resulting in a completed crime.[6]

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[6] *See* Peter Margulies, *Defining, Punishing & Membership in the Community of Nations: Material Support and Conspiracy Charges in Military Commissions*, 36 Fordham Int'l L.J. 1, 84-87 (2013). Because al Bahlul administered the *bayat* to two of the key September 11 hijackers and helped "keep them on task," Tr. 555-56, his conduct also met the requirements for aiding and abetting liability. *See Prosecutor v. Perisić*, Case No. IT-04-81-A, Appeals Chamber Judgment, ¶ 27 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013) (holding that the actus reus of aiding and abetting requires that the defendant's conduct was "specifically… directed towards relevant crimes"); *see also Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Judgment, ¶ 482 (Special Court for Sierra Leone, May 18, 2012) (defining aiding and abetting broadly as lending "practical assistance, encouragement, or moral support to the perpetration of a crime or underlying offence"). To be guilty of aiding and abetting, a defendant need not have knowledge of the particular crime that his conduct has facilitated. *See Prosecutor v. Stanisic & Simatovic*, Case No. IT-03-69-T, Trial Chamber Judgment, ¶ 1264 (Int'l Crim. Trib. for the Former Yugoslavia May 30, 2013) (noting that a defendant, "does not…need to know either the precise crime that was intended or

II. THE DEFENDANT'S CONVICTION COMPLIES WITH THE EX POST FACTO CLAUSE

Because of the pedigree of conspiracy as a mode of liability, the conviction in the instant case complied with the Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3, even though the specific conduct at issue preceded enactment of the Military Commissions Act of 2006. The Supreme Court has held that, even absent a statute that specifically punishes particular conduct, military tribunals authorized by Congress can try individuals for violations of the customary international law of armed conflict. *See Ex Parte Quirin*, 317 U.S. 1, 46 (1942) (finding that "the Constitution authorizes" military commission jurisdiction over "acts [that] constitute an offense against the law of war"); *In re Yamashita*, 327 U.S. 1, 7 (1946) (noting that, "Congress, by sanctioning trial of enemy combatants for violations of the law of war by military commission, had not attempted to codify the law of war or to mark its precise boundaries").

Transnational tribunals have reached the same conclusion in construing the international law principle of legality, which limits punishable conduct to acts that violated a binding norm that was recognized as such at the time of the conduct.

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the one that was actually committed; it is sufficient that he or she be aware that one of a number of crimes will probably be committed, if one of those crimes is in fact committed") (emphasis added).

See Beth van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 Geo. L.J. 119, 121, 125-41 (2008) (defining principle and tracing its application in Nuremberg and subsequent international tribunals). The ICTY recognized JCE as a mode of liability even though JCE was not "*explicitly*" authorized in the ICTY statute. *See Prosecutor v. Milutinovic*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Appeals Chamber, ¶ 21 (Int'l Crim. Trib. for the Former Yugoslavia May 21, 2003) (emphasis added).[7] Implicit authorization for JCE was considered sufficient, because customary international law provided the defendant with adequate notice at the time of his conduct that his acts were unlawful. *Id.*

Post-World War II tribunals held that customary international law prohibited intentional participation in a common plan resulting in a completed war crime. *See Brdanin*, Case No. IT-99-36-A, Appeals Chamber Judgment, ¶¶ 393-404 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007). On September 11, 2001, this customary prohibition had been in place for over fifty years. The Military Commissions Act of 2006 established the jurisdiction of military commissions "to

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[7] Available on Westlaw at 2003 WL 24014138 and at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/00207160-00207178.pdf.

try any offense made punishable by… the law of war." See § 948d, Pub. L. No. 109-366, 120 Stat. 2603. The defendant's conviction for aid to the September 11 plot therefore comports with the Ex Post Facto Clause.

III. THE ERROR IN THE INITIAL CONSPIRACY CHARGE WAS HARMLESS BECAUSE AL BAHLUL HAD FAIR NOTICE OF THE CHARGES AGAINST HIM AND AN ADEQUATE OPPORTUNITY TO PREPARE A DEFENSE

In addition to fair notice that his or her acts violated the law at the time of the conduct at issue, a defendant on trial must have adequate notice of the charges he or she faces. *See United States v. Miller*, 471 U.S. 130, 134 (1985) (asking whether the defense was "on notice that the offense was charged and would need to be defended against"). Modest variance between the charges as originally filed and the evidence at trial has been viewed as harmless error, as long as the variance did not "prejudice[] the fairness of respondent's trial." *Id.* In the instant case, the defendant had adequate notice that he was being charged with conspiracy as a mode of liability for a completed war crime and was afforded a fair opportunity to put on a defense.

United States courts have routinely found harmless error where evidence introduced at trial exhibited minor variance with the charging document. For example, in *United States v. Ratliff-White*, 493 F.3d 812 (7th Cir. 2007), the court

found harmless error where an indictment for alleged fraud in billing the Veterans' Administration referred to one specific step in the payment process, while proof at trial dealt with another step. *Id.* at 821-24; *see also United States v. Dupre*, 462 F.2d 131, 140-41 (2d Cir. 2006) (indictment charged that defendant caused investor to wire money from Ohio to New York; evidence failed to establish this transfer but showed others as part of same scheme). Courts have found prejudice only where evidence at trial concerned a distinct scheme not included in the indictment. *See Stirone v. United States*, 361 U.S. 212, 213-14 (1960) (vacating conviction of union official where charge involved extortion in provision of sand for construction of steel plant and evidence concerned extortion in shipment of steel from completed plant). Where the charge and the evidence introduced involved related acts in an ongoing scheme, courts have held that the variance was harmless because the defendant "could not have been surprised" by the evidence introduced and was therefore "not deprived of an adequate opportunity to prepare a defense." *See Ratliff-White*, 493 F.3d at 823; *see also United States v. Burge*, 711 F.3d 803, 814 (7th Cir. 2012) (variance between charge and evidence was harmless error because the defendant had "reasonable notice of the charges against him and an adequate opportunity to prepare his defense").

The same pragmatic approach has characterized the judicial response to charges in military commissions and transnational tribunals adjudicating alleged violations of the laws of armed conflict. In *In re Yamashita*, 327 U.S. 1 (1946), the Supreme Court observed that, "[o]bviously charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment." *Id.* at 17. In his plurality opinion in *Hamdan I*, Justice Stevens cautioned against reliance on the "label" attached to conduct charged in a military commission, asserting that the label mattered less than the "succession of… acts" alleged by the prosecution. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 600 n. 32 (2006) (quoting Civil War-era opinion of U.S. Army Judge Advocate General). Elsewhere in his opinion, Justice Stevens recognized the historical importance to the prosecution in military commissions of specifying overt acts, noting that "'*overt acts*' constituting war crimes… [were] the only proper subject" of law-of-war military commissions. *Id.* at 608, *citing* W. Winthrop, *Military Law and Precedents* 841 (rev. 2d ed. 1920) and William F. Finlason, *Martial Law* 130 (1867) (emphasis in original). The International Criminal Tribunal for the former Yugoslavia has also adopted a practical approach to notice, holding that the failure to plead the charge of JCE does not require vacating the trial court judgment when defendants had received notice of the "factual basis of the charges against them."

Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Appeals Chamber Judgment, ¶ 43 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005).

Based on the record and findings in *al Bahlul*, the defendant received ample notice that he was being charged with conduct properly triable before a military commission. While the list of charges filed with the Convening Authority in al Bahlul's case did not cite universally accepted war crimes such as aiding and abetting or conspiracy as a mode of liability for a completed war crime, the list of overt acts attached to the charge sheet provided the defendant with adequate notice. One specification cited al Bahlul's alleged administration of the *bayat* to Atta and al Jarrah. *See* Overt Act List at (g), Pet. App. 122. The defendant had previously written a letter asserting that this act played a "role" in the attacks. *See* Prosecution Exhibit 15, Pet. App. 208. Another overt act alleged expressly drew the connection between the defendant's acts and September 11, charging that the defendant had prepared the martyr wills of Atta and al Jarrah "in preparation for" the 9/11 attacks. *See* Overt Act List at (h), Pet. App. 122. This list of overt acts gave the defendant the notice he needed to prepare a defense.

The defendant's trial strategy demonstrated that he fully understood the import of the overt acts alleged in the charging packet. The defendant offered no evidence. However, his statements at trial in his capacity as his own defense

counsel are instructive, not for their truth, which was not considered by the members of the commission, but as a gauge of his understanding of the charges he faced. Acting as his own counsel, al Bahlul echoed his earlier claim in a letter admitted into evidence that he had not enjoyed the "honor" of *videotaping* the martyr wills, because bin Laden had sent him back to Yemen at the time of the taping. *See* Tr. 193-94; *see also* Prosecution Exhibit 15, Pet. App. 208 (letter written by the defendant). The defendant's position at trial indicated that he fully understood the overt act specification in the charging document that he had "prepared" the martyr wills of Atta and al Jarrah. *Id.* at 122. The members of the commission nonetheless found that the defendant had prepared the martyr wills, *id.* at 133, apparently relying on the acknowledgment in the letter from the defendant that he had "typed their [Atta's and al Jarrah's] martyr wills on a computer and personally handed it" to bin Laden. *Id.* at 208. Acting as his own defense counsel, the defendant readily acknowledged that he had committed the charged overt act of administering the *bayat* to Atta and al Jarrah. Tr. 193-94. The members of the commission expressly found this as a fact, apparently relying again on the defendant's letter. *See* Pet. App. 132; *see also id.* at 208 (defendant's letter).

Adequate notice to a defendant does not require uniform findings in the defendant's favor. It merely requires that the defendant have a fair opportunity to

contest the charges against him. The charging documents in their entirety, including the listing of specific overt acts alleged, gave al Bahlul this opportunity. "[T]ested by any reasonable standard," the charging documents in al Bahlul's case "adequately allege[d] a violation of the law of war." *Yamashita*, 327 U.S. at 17. Given the evidence in the record of al Bahlul's contributions to the preparation for 9/11, requiring greater precision would merely add another layer to the veil of "impunity" that courts have pierced in cases adjudicating war crimes. *Id.* at 15.

IV. THE RECORD AND FINDINGS DEMONSTRATE THAT THE INSTRUCTIONS' FAILURE TO REQUIRE A FINDING OF A COMPLETED WAR CRIME WAS HARMLESS ERROR

Courts commonly apply a harmless error test to errors in jury instructions, including those that concern the elements of offenses. See *Neder v. United States*, 527 U.S. 1 (1999); *California v. Roy*, 519 U.S. 2 (1996); *Carella v. California*, 491 U.S. 263 (1989). The erroneous instruction is merely an "error in the trial process", not a structural flaw in the "framework within which the trial proceeds..." *Neder*, 527 U.S. at 8 (citation omitted). In the instant case, the instruction that a guilty verdict on conspiracy did not require a completed war crime was harmless error, in light of the evidence and the commission members' specific factual findings.

Courts have routinely found harmless error analysis applicable to jury instructions where the jury verdict "effectively embraces" the point in dispute. *Roy*, 519 U.S. at 7 (Scalia, J., concurring). In one case, a jury had found that the defendant without provocation shot to death two other persons after following them for about an hour. The Supreme Court held that harmless error analysis was appropriate even though the trial judge had erroneously instructed the jury to *presume* intent to harm the victims – a necessary element of second-degree murder. *Rose v. Clark*, 478 U.S. 570 (1986). The Court noted that although this instruction was erroneous, a correct instruction would still have permitted the jury to *infer* malice from the defendant's actions. *Id.* at 581. Here, the Court reasoned, this inference was "overpowering." *Id.*[8]

Following Holmes's observation that the "life of the law has not been logic but experience," *Neder*, 527 U.S. at 15, citing O. Holmes, *The Common Law* 1 (1881), a reviewing court will generally find that mistaken jury instructions are harmless if the court "can find that the record developed at trial establishes guilt beyond a reasonable doubt." *Rose*, 478 U.S. at 579. Where a new trial would not result in additional evidence on the point in question, but would simply relitigate

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[8] The Court then remanded for a determination by the court below of whether the error was harmless. *Id.* at 584.

other matters in which the instructions were correct, courts have generally found the faulty instruction to be harmless error. See *Neder*, 527 U.S. at 15 (applying harmless error standard to judge's failure to instruct jury in tax fraud case on need to find that misstatements were material, where defendant had underreported income in the amount of $5 million).

The harmless error standard governs the instruction in the instant case. The instruction on conspiracy in the instant case was erroneous, because it permitted the members of the commission to find the defendant guilty of conspiracy based on mere agreement, without a completed crime. *Amici* concede that, unless this Court accepts the government's broader "United States common law of war" argument, conspiracy as a mode of liability is the only variety of conspiracy charge that supports military commission jurisdiction in this case. Conspiracy as a mode of liability by definition requires a completed crime. However, the instruction's error was harmless, because the commission members' specific findings and the evidence in the case readily satisfy the broad standard for JCE liability.

Liability for JCE is broad, to deprive perpetrators of war crimes of the impunity that they have long enjoyed. *Cf.* Preamble, Rome Statute of the International Criminal Court, July 17, 1998, 2189 U.N.T.S. 90 (noting importance of putting an "end to impunity for the perpetrators" of war crimes). To prevail on a

charge of JCE, the prosecution need only show that a defendant intentionally participated in "one aspect" of a common plan to target civilians. *Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 196 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999). In the instant case, the members of the commission found that the defendant had administered the *bayat* to Atta and al Jarrah. Pet. App. 132. Sufficient evidence indicated that this act, by qualifying Atta and al Jarrah to give their lives in jihad against America, was a necessary building block in the arrangements for September 11. In a letter admitted into evidence, the defendant himself described the *bayat* as constituting "simple… indirect" aid to the September 11 plot. Pet. App. 208. Moreover, other evidence in the case cast the defendant as "coordinating… [Atta and al Jarrah's] stay" with bin Laden as the two men prepared for a mission of great "sensitivity." Tr. 555. Although the defendant did not testify under oath, his statements on the record while acting as his own counsel acknowledged that he had administered the *bayat*. Tr. 193-94. In theory, the defendant could deny the allegation at a second trial. However, the impact of his letter acknowledging the *bayat* renders that strategy both improbable and unlikely to lead to a different result.

In sum, the instruction here had no greater impact than the instruction in *Neder*, 527 U.S. at 15. There, the defendant had faulted the omission of the

materiality element from instructions on tax fraud. However, the defendant did not contest at trial or suggest on appeal that he would dispute the materiality of underreporting $5 million in profits he netted from obtaining fraudulent real estate loans. *Id.* Viewing the failure to disclose $5 million in income as manifestly material, the Court found that the omission of the materiality element was harmless error. *Id.* at 19-20. In the instant case, the broad legal standard for JCE, the ample evidence, the commission members' specific findings, and the defendant's statements as his own counsel at trial reflect a comparable absence of prejudice. Therefore, the mistaken instruction here was similarly harmless.[9]

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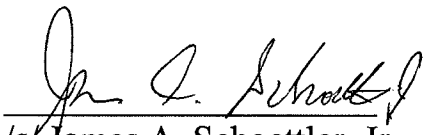
[9] The same harmless error analysis applies to the instructions on material support, which supplied two alternative bases for finding the defendant guilty. One centered on "an agreement… to provide material support or resources to be used in preparation for or in carrying out an act of terrorism." Tr 856-57. The second involved material support to Al Qaeda as an organization. *Id.* at 857. The second instruction contained a material error: it required a finding of guilt for conduct, such as providing services to a terrorist group unrelated to a specific war crime, that is illegal under federal law but nonetheless beyond the jurisdiction of a military commission. *See Hamdan II*, 696 F.3d at 1249-52. In contrast, the first instruction featured the same harmless error as the instruction on conspiracy: it failed to require proof of a completed war crime. The specific findings on material support in the instant case demonstrate that the members of the commission analyzed the defendant's conduct under the first instruction and found a completed crime. The commission members found that the defendant's administering the *bayat* to Atta and al Jarrah was an overt act furthering material support of terrorism. Pet. App. 136. That finding hinged on evidence of the *bayat*'s

CONCLUSION

The convictions should be affirmed.

Dated: July 25, 2013

Respectfully submitted,



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importance in qualifying Atta and al Jarrah for crucial missions, such as the September 11 attacks. Tr. 509-10.

Appendix

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William C. Banks is the College of Law Board of Advisors Distinguished Professor at Syracuse University, Professor of Public Administration in Syracuse University's Maxwell School of Citizenship and Public Affairs, and founding director of Syracuse's Institute for National Security and Counterterrorism. He is co-author of two casebooks, 1) *National Security Law* (5th ed. 2011) (with Stephen Dycus, Arthur C. Berney, and Peter Raven-Hansen); and, 2) *Counterterrorism Law* (2d ed. 2012) (with Dycus and Raven-Hansen). He recently edited the Oxford University Press collection, *Counterinsurgency Law: New Directions in Asymmetric Warfare* (2013), and is Editor-in-Chief of the *Journal of National Security Law & Policy*.

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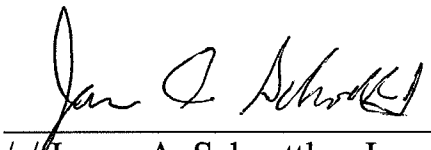
Benjamin Wittes is Senior Fellow, Governance Studies, at the Brookings Institution. A founder and editor in chief of the Lawfare blog, he is author of the books, *Law and the Long War: The Future of Justice in the Age of Terror* (2008) and *Detention and Denial: The Case for Candor After Guantanamo* (2011).

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief has been prepared in a proportionally spaced 14-point Times New Roman typeface using Microsoft Word 2010 and contains 5,350 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii).

Dated: July 25, 2013



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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July, 2013, I caused true and correct copies of the foregoing brief of *amici curiae* Former Government Officials, Military Lawyers and Scholars of National Security Law to be served via electronic mail upon all counsel of record, by operation of the Court's ECF system.

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